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ALEXANDER L. STEVAS,
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No. 83-1027

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

KERRY D. MORTON,

Petitioner,

v.

ARCH F. HILDEBRANDT, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTION PRESENTED FOR REVIEW

May a state supreme court judicially determine that the comparative negligence statute adopted by that state's legislature is retroactive in its application and not apply that same standard of retroactivity to all cases pending before that court wherein the prospective application of the comparative negligence statute at the trial and intermediate appellate level resulted in the grant of a summary judgment by all defendants against the petitioner, without thereby denying the petitioner's right to Equal Protection and Due Process of Law guaranteed by the Fourteenth Amendment to the United States Constitution?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

KERRY D. MORTON,

Petitioner,

v.

ARCH F. HILDEBRANDT, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners prays that a Writ of Certiorari issue to review the judgment herein of the Supreme Court of Ohio, entered September 21, 1983.

OPINIONS BELOW

The Decision of the Court of Common Pleas of Hamilton County, Ohio, granting the motions for summary judgment on behalf of all defendants dated February 10, 1982, is printed in Appendix C hereto. The decision of the Court of Appeals for the First Appellate District of Ohio, under docket number C-820247, affirming the judgment of the Court of Common Pleas of Hamilton County, Ohio, dated March 2, 1983 is printed in Appendix D, attached hereto. The entry of the

Supreme Court of Ohio, dated Septembr 21, 1983, dismissing for want of a constitutional question the appeal from the decision of the Court of Appeals for the First Appellate District of Ohio, is printed in Appendix A attached to this petition. The entry of the Supreme Court of Ohio dismissing the motion for an order directing the Court of Appeals to certify its record dated September 21, 1983, is attached as exhibit B. The notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of Ohio on December 19, 1983.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3). Rule 19 (1) of the Rules of the Supreme Court of the United States provides:

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling or fully measuring the Court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with the applicable decisions of this Court."

CONSTITUTIONAL PROVISION

Fourteenth Amendment to the Constitution of the United States of America.

STATEMENT OF THE CASE

On July 23, 1979, Robert P. Cornett, not a party to the litigation, was southbound on Columbia Road in Deerfield Township, Warren County, Ohio, approaching the intersection of Fields-Ertel Road. At that same time and place, the petitioner was westbound on Fields-Ertel Road. The stop sign controlling the westbound traffic on Fields-Ertel Road is located at Deerfield Township, Warren County, Ohio, on property owned by defendants Phillip K. Pope and Cathy J. Pope. This stop sign was hidden by foliage which had been allowed to grow in front of the stop sign. Additionally, substantially to the east of the intersection was a sign indicating only that there was an intersection ahead as opposed to the stop sign being ahead as mandated by regulations adopted by appropriate state statute.

Being on a highway with a speed limit of 55 miles per hour, the petitioner entered the intersection at which time a collision took place between the motorcycle he was operating and the pickup truck driven by Mr. Cornett. The petitioner has been in a coma since the date of the accident.

The governmentally related defendants responded to the petitioner's pleading by filing a motion for summary judgment on behalf of the county and township officials. These motions were grounded on both a doctrine of sovereign immunity and the contributory negligence of the petitioner and were granted. The nongovernmental defendants moved for summary judgment solely on the issue of the contributory negligence of the petitioner.

While on appeal, the Supreme Court of Ohio decided the case of *Haverlack* v. *Portage Homes, Inc.*, (1982), 2 Ohio St. 3d 26, 442 N.E.2d 749. The Supreme Court judicially abrogated the common law principal of Governmental immunity as it relates to negligent acts of Governmental employees, in the State of Ohio.

On August 3, 1983, after the memoranda relating to jurisdiction had been filed in the within cause in the Ohio Supreme Court, that Court issued its decision in the case of *Wilfong* v.

Batdorf, (1983), 6 Ohio St. 3d 100, 451 N.E.2d 1185. There the Court held in paragraph 3 of the syllabus:

> "No. 3. The principal of comparative negligence, consistent with the provisions of R.C. 2315.19, applies to all negligence actions tried after June 20, 1980, irrespective of when the cause of action arose, as part of the common law of Ohio. (*Viers* v. *Dunlap*, (1982), 1 Ohio St. 3d 173, 438 N.E.2d 881 and *Straub* v. *Voss*, (1982), 1 Ohio St. 3d 182, 438 N.E.2d 888), to the extent inconsistent herewith overruled."

The Trial Court specifically noted in its decision, attached hereto in Appendix C, that were the comparative negligence standard applied to the instant case as opposed to the contributory negligence standard, a different result would eventuate.

THE REASONS FOR GRANTING THE WRIT

The act of the Supreme Court of Ohio, dismissing the appeal from the affirmance by the Court of Appeals for the First Appellate District of Ohio of the dismissal by the Trial Court as to all defendants:

1. Is in conflict with the recent decisions of the Supreme Court of Ohio in *Wilfong* v. *Batdorf* and *Haverlack* v. *Portage Homes, Inc.*, as enlarged as to Governmental immunity in the case of *Enghauser Manufacturing Company* v. *Eriksson Engineering, Ltd.*, (1983), 6 Ohio St. 3d 31, 451 N.E.2d 228.

2. Effectively deprived the petitioner of his right to Equal Protection and Due Process of Law guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

ARGUMENT

As readily appears from the Appendix, this cause concerns a claim for personal injuries against various defendants. Specifically, the petitioner contends that the respondents, individually or in concert, violated certain statutory obligations imposed upon them for the installation and maintenance of various traffic control devices and permitted a stop sign to become obstructed as a result of which the petitioner sustained serious injuries.

Since the Trial Court's ruling and the Appellate Court's affirmance thereof, broad and sweeping changes have occurred in the law of Ohio in general and as it applies to the instant case in particular. As the Trial Court noted in his opinion in granting the defendants' motions for summary judgment:

> "It the comparative negligence statute (2515.10 O.R.C.) covered this situation (which it does not), the plaintiff would have a justiciable claim against those moving for summary judgment."

It is to be noted that the Trial Court's ruling was on motion for summary judgment and was rendered on February 10, 1982. This matter has never been "tried".

On August 3, 1983, after the memoranda relating to jurisdiction had been filed in the within cause in the Ohio Supreme Court, that Court issued its decision in the case of *Wilfong* v. *Batdorf*, (1983), 6 Ohio St. 3d 100, 451 N.E.2d 1185. There the Court held in paragraph 3 of the syllabus:

> "No. 3. The principal of comparative negligence, consistent with the provisions of R.C. 2315.19, applies to all negligence actions tried after June 20, 1980, irrespective of when the cause of action arose, as part of the common law of Ohio. (*Viers* v. *Dunlap*, (1982), 1 Ohio St. 3d 173, 438 N.E.2d 881 and *Straub* v. *Voss*, (1982), 1 Ohio St. 3d 182, 438 N.E.2d 888), to the extent inconsistent herewith, overruled."

The Supreme Court of Ohio has also abrogated the common law concept of Governmental immunity which was asserted in the Trial Court as a bar to the petitioner's right to proceed against certain of the Governmental defendants. *Enghauser Manufacturing Company* v. *Eriksson Engineering, Ltd.*, (1983), 6 Ohio St. 3d 31, 451 N.E.2d 228. Specifically, and more to the point based upon the facts of this case, the Supreme Court of Ohio held in the case of *Strohofer* v. *City of Cincinanti*, (1983), 6 Ohio St. 3d 118, 457 N.E.2d 787, decided on August 3, 1983, that a municipality statutorily charged with keeping its streets open, in repair and free from nuisance, could not avail itself of the protection of sovereign immunity, for allegedly designing and placing traffic control devices in a manner which led to confusion to the motoring public, thus creating the nuisance.

Although both *Enghauser* and *Strohofer*, supra, deal with Governmental immunity as to municipalities and the Governmental defendants in the instant case are township trustees, county commissioners and a county engineer, the Court's stated purpose in abrogating the doctrine of Governmental immunity is clear:

> "It is clear from our decision, however, that we rejected the continued viability of the doctrine of sovereign immunity as a defense. We reach that result upon finding that attempts to apply the doctrine resulted in confusion and unpredictability in the law; that its application created unjust results; and that it was unnecessary because municipalities can protect themselves from liability in the same manner as private businesses". (*Id.* p. 21)

The same result had been achieved where sovereign immunity was asserted as a defense on behalf of a board of education for the negligence of one of its employees. *Carbone* v. *Overfield*, (1983), 6 Ohio St. 3d 212, 451 N.E.2d 1229.

It is reasonable to expect that the same rationale concerning

the abrogation of Governmental immunity will apply to township trustees, county commissioners and county engineers for their negligence and the negligence of their employees.

Further, in *Dickerhoof* v. *Canton*, (1983), 6 Ohio St. 3d 128, 451 N.E.2d 1193, the Supreme Court of Ohio extended a municipality statutory duty to maintain streets open, in repair and free from nuisance, to include the duty to keep the shoulder of the road in repair.

What can be a closer analogy than that to the statutory duty imposed by Section 4511.11 upon the county engineer and/or township trustees in the instant case? Section 4511.11 of the Ohio Revised Code provides in pertinent part:

> "(A) Local authorities in the respective jurisdiction shall place and maintain traffic control devices in accordance with the Department of Transportation Manual and specifications for a uniform system of traffic control devices, adopted under § 4511.09 of R.C. upon highways under their jurisdiction as are necessary to indicate and to carry out § 4511.01 to 4511.76 and 4511.99 of R.C., local traffic ordinances, or to regulate, warn or guide traffic."

It is clear that the posting of the intersection ahead sign and the obstruction of the stop sign were in violation of this section of the Ohio Revised Code and the duty to maintain the roadway free from nuisance.

CONCLUSION

It is respectfully submitted that when the Supreme Court of Ohio changes the law, the changes in the law should inure to the benefit of all petitioners presently before that Court if the change in law would change the result in the courts below. The failure to do so denies the petitioner of his right to Equal Protection and the Due Process of Law as mandated by the Fourteenth Amendment to the United States Constitution. It is respectfully submitted that the petitioner's writ should be granted.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1983 TERM
City of Columbus.) To wit: September 21, 1983

No. 83-861

KERRY D. MORTON,

Appellant,

vs.

ARCH F. HILDERBRANT, et al.,

Appellees.

APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....
..... Clerk
..... Deputy

APPENDIX B

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1983 TERM
City of Columbus.) To wit: September 21, 1983

No. 83-861

KERRY D. MORTON,

Appellant,

vs.

ARCH F. HILDERBRANT, et al.,

Appellees.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR HAMILTON COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled. COSTS:

Motion Fee, $20.00, paid by $20 James Slattery, Jr., $20 James L. Flannery.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....
..... Clerk
..... Deputy

APPENDIX C

COUNTY OF HAMILTON
Court of Common Pleas
Cincinnati, Ohio 45202
February 10, 1982

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Re: Morton V. Hildebrandt
Case No. A-81-00845

OPINION

Gentlemen:

This matter is before the Court upon Motions for Summary Judgment filed on behalf of Warren County Engineer, Deer-

field Township Trustees, and Phillip Pope and Cathy Pope, together with relevant pleadings, affidavits, answers to interrogatories, deposition, memoranda and oral argument.

This action arose out of a collision between plaintiff's motorcycle and a truck at the intersection of Columbia Road and Fields Ertel Road. Plaintiff alleges in his complaints that defendants negligently maintained the roadway and or maintained a nuisance, all to plantiff's damage.

The specifics of plaintiff's allegations of negligence and nuisance brought out in the affidavits, interrogatories, and depositions, are that a stop sign at the intersection was obscured by foliage and that a sign located eastwardly of the intersection read "intersection ahead" rather than "stop ahead."

The movants each rely, at least in part, upon the defense of contributory negligence. Contributory negligence is a valid defense, obviously, in a negligence action, and can also be a valid defense in an action involving nuisance:

> "The learned discussion of Judge Cardoza . . . (dealt) . . . primarily with the proposition that contributory negligence is available as a defense to an action for nuisance based upon negligence . . ."
>
> • • •
>
> ". . . Nuisance as a concept of law has more meanings than one. The primary meaning does not involve the element of negligence as one of its essential factors . . . One acts sometimes at one's peril. In such circumstances, the duty to desist is absolute, whenever conduct, if persisted in, brings damages to another . . . He is not to do such things at all, whether he is negligent or careful. . . . Other situations there are, however, where what was lawful in its origin may be turned into a nuisance by negligence in maintenance." (*Taylor* v. *Cincinnati;* 1944; 143 OS 426; 18 00 369, at page 375).

It is evident from the pleadings and affidavits, etc., that the nuisance in this case arises out of defendants' alleged

negligence in the maintenance of signs and trimming of bushes – that, therefore, the claim of nuisance herein is susceptible to the defense of contributory negligence

We must next determine whether plaintiff was guilty of contributory negligence as a matter of law.

The basic facts pointing to negligence on the part of plaintiff are those asserted in the affidavit of Robert P. Cornett, attached to the Motion for Summary Judgment filed on behalf of the Commissioners of Warren County:

> "1. . . . accident on July 23, 1979, at approximately 2:15 p.m. . .
>
> "3. . . . he observed Morton's motorcycle travel through the posted stop sign at an excessive rate of speed and crash into his pickup truck . . .
>
> "5. Those vehicles traveling on Fields-Ertel were required to stop at the designated stop signs, at the intersection itself, there are stop signs posted at the northeast and southwest corners . . .
>
> "6. The intersection itself is flat with good visibility for traffic from any direction.
>
> "7. . . . visibility was good, and the weather conditions were fair.
>
> "8. The roadbed was in good condition, with no cracks or holes necessitating repair . . ."

The facts presented by plaintiff to counter the assertions are primarily those set forth in the affidavit of Dale Morton:

> "4. . . . the only sign east of the intersection was a sign designating that there was an intersection ahead.
>
> "5. . . . there was no sign indicating that . . . westbound traffic . . . would have to come to a stop at that intersection.
>
> "6. . . . the intersection was not readily observable from a position back from the intersection."

"7. . . . foliage obstructed the stop sign . . . and could not readily be seen."

From the foregoing it may be assumed, for purposes of these motions, that the decedent traveled through the stop sign at the intersection and hit a truck; that the intersection was not readily observable; that the stop sign could not readily be seen because of foliage.

The bare-bones allegations of the affidavits do not state at what speed the decedent was traveling ("excessive" being a conclusion, not a fact under Civil Rule 56E); nor how far back from the intersection the sign warning of an intersection was placed; nor whether the decedent passed such warning sign; nor where the foliage was that obstructed the stop sign or whose foliage it was. However, it is clear that decedent traveled through a stop sign and crashed into a truck. We read as follows in *State* v. *Ray;* (1958); 79 OLA 528, at page 531:

> "'It is the court's opinion that sec. 4511.43 R.C. is a positive and specific rule of conduct passed by the Legislature of the State of Ohio to govern the conduct of motorists in using the highways . . .'"

In *Lehman* v. *Westhaven,* (1967; 10 0A 2d 66; 39 OO 2d 133) we read at page 135:

> "The defendant in failing to stop in obedience to the stop sign before entering the intersection violated the statute (Section 4511.43, Revised Code), and his failure to stop was a continuing violation to the point of collision."

It is, therefore, clear that plaintiff's decedent was acting negligently at the time of the collision – unless the presence of foliage making the stop sign and intersection not readily seen implies otherwise.

On the latter point we read the following:

"A motorist is not excused from disregarding a stop sign at an intersection by the fact that a 'defense barrel' had been placed so as to obstruct his view of such sign as he approached (*Franz* v. *Levine;* 1943; 72 O.A. 280; 27 OO 119; headnote)

"A motorist approaching an intersection should in the exercise of reasonable care anticipate that a sign might be hidden and not proceed until he had learned the fact" (*Ibid,* page 120)

"A municipality may, by ordinance, designate a main thoroughfare, provided legible and approximate signs are properly erected along the intersecting roads; but after such compliance the main thoroughfare does not lose its status merely because a sign on an intersecting road becomes illegible or is destroyed." (*Connors* v. *Dobbs;* 1945; 77 OA 247; 32 OO 552; headnote # 1)

"Dobbs knew that Hawkins Avenue south of Market Street was a main thoroughfare, but claims he did not know such to be the case north of Market Street . . .

". . . there was . . . no stop sign . . .

". . . the place where the collision . . . occurred was within the intersection of two improved streets . . .

"Plaintiff Connors, possessed of knowledge that Hawkins Avenue was a main thoroughfare, had a right to rely on that knowledge and upon his preferential right to proceed uninterruptedly across . . . intersection . . .

"Dobbs, under these circumstances, was by law required to stop before entering the intersection, and his failure so to do was negligence."

"A proper sign having been erected, Dobbs was charged with knowledge of the designation of Hawkins Avenue by ordinance as a main thoroughfare, even in the then absence of a stop sign . . ." (*Ibid,* page 553).

" '. . . a motorist involved in a collision at an intersection with an automobile approaching from the left on an

> arterial highway can not be heard to say that he did not know of the existence of the stop sign or that he could not see it . . .'"
>
> "It being established by the great weight of authority that Flannery did not have the right of way at the intersection of Robinson Avenue and Offnere Street, and that he was bound by law to know this, when he testified that he did not stop and did not look to his left and that he did not observe any traffic on Offnere Street going either way, when in fact if he had looked he would have seen the car approaching and entering the intersection on the arterial street, his testimony at least raised a presumption of negligence . . . and the burden was cast upon him to dispel that presumption . . ." (*Flannery* v. *Tessaromatis;* 1949; 91 OA 215; 48 OO 335, at page 339).

In the instant case, there is no evidence that plaintiff's decedent knew what kind of road he was traveling, whether or not he was in fact aware of the intersection or the stop sign, whether he passed or saw the sign warning of an intersection. However, this much is clear from the cases above cited: the driver of the truck had the right of way; the decedent, because a stop sign was posted, was presumed to know that he was not traveling on a thoroughfare.

Most importantly, the evidence before the Court is that because of the foliage the intersection was "not readily observable" and the stop sign "could not readily be seen." However, what is not readily seen or observable is nonetheless seeable and observable. The plaintiff cannot be heard to say that decedent did not see what was seeable; or if he be heard to say that, he cannot deny decedent's negligence in ignoring what he saw.

The affidavit of Robert P. Cornett recites that the stop sign was "not observable from the west." This statement, taken as true because not contradicted, is nonetheless irrelevant because the decedent was traveling in an eastwardly direction.

Plaintiff argues that the sign preceeding the intersection

read "intersection ahead" rather than "stop ahead." This fact, if accepted as true, does not change the fact that decedent did not see the stop sign.

Plaintiff further argues that the following statement in *Royce* v. *Smith* (1981; 68 O.S. 2d 106) should defeat the summary judgment motions:

> ". . . we hold that a complaint . . . seeking to impose liability on the township trustees for their alleged negligence in failing to maintain a stop sign located on a township road states a claim upon which relief can be granted" (Pg. 114).

This statement does not conflict with the decisions discussed above. The *Royce* rationale did not address itself to the issue of contributory negligence, which defense is applicable in the instant matter for the reasons already given.

It is certainly arguable that those responsible for the existence of foliage allegedly partially obscuring the stop sign were negligent and shared responsibility for the collision. If the comparative negligence statute (2315.19 O.R.C.) covered this situation (which it does not), then plaintiff would have a justiciable claim against those moving for summary judgment.

In view of the foregoing it is clear that plaintiff's claim is barred because of the contributory negligence of plaintiff's decedent.

Wherefore summary judgment is awarded each movant.

This matter is continued to February 24, 1982, 1:00 p.m. for entry. Please include *all* parties in the caption of the entry or entries.

Sincerely,

/s/ THOMAS H. CRUSH,
Judge

APPENDIX D

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-820247

KERRY D. MORTON,
Plaintiff-Appellant,

vs.

ARCH F. HILDEBRANDT, CARL BRADSTREET, and ROBERT L. TURNER, COMMISSIONERS OF WARREN COUNTY

and

CRAIG R. PENDLETON, WARREN COUNTY ENGINEER

and

DEERFIELD TOWNSHIP TRUSTEES

and

PHILLIP K. and CATHY J. POPE,
Defendants-Appellees.

DECISION.

(Filed March 2, 1983)

Messrs. Lindhorst & Dreidame, James J. Slattery, Jr., of counsel, 1200 American Building, Cincinnati, Ohio 45202, for Plaintiff-Appellant,

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Mr. Timothy A. Oliver, 313 East Warren Street, Lebanon, Ohio 45036, for Defendant-Appellee, Craig R. Pendleton, Warren County Engineer,

Messrs. Baden, Jones, Scheper & Crehan Co., L.P.A., James H. Scheper, of counsel, 300 Hamilton Center Building, Hamilton, Ohio 45011, for Defendants-Appellees, Deerfield Township Trustees,

Messrs. Droder & Miller, Eugene Droder, of counsel, 410 Provident Bank Building, Cincinnati, Ohio 45202, for Defendants-Appellees, Phillip K. and Cathy J. Pope.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the oral arguments of counsel.

The matter *sub judice* arose from a collision between appellant's motorcycle and a truck at the intersection of Columbia and Fields-Ertel Roads. Appellant filed a complaint alleging that the accident was the result of appellees' failure to properly maintain the roadway and seeking to recover damages for injuries he had sustained. The trial court granted summary judgment for appellees on the basis of appellant's contributory negligence. Appeal was timely filed, with appellant's single assignment of error contending that the trial court erred in granting summary judgment for appellees.

The record shows that Columbia Road runs north-south and Fields-Ertel Road runs east-west. Columbia is a through road, but Fields-Ertel traffic is required to stop before entering the intersection. Stop signs are located at the intersection's northeast and southwest corners. The affidavit of the driver of

the truck (not a party to the litigation) reveals that on July 23, 1979, he was southbound on Columbia Road at a speed of approximately forty miles per hour. When he reached the intersection of Columbia and Fields-Ertel Roads, he saw appellant's motorcycle, approching from the east, go through the stop sign posted on Fields-Ertel Road and crash into his truck. The investigating police officer's affidavit states his conclusion that the accident was caused by appellant's running of the stop sign. The affidavit further states that the intersection is flat and that on the day of the accident the visibiliy was good.

Based on his father's affidavit, appellant has argued that his failure to stop at the intersection was caused by his inability to see the stop sign which was allegedly obscured by foliage; he contends that appellees are liable for his injuries because they did not properly maintain the sign. We cannot agree. Appellant's father's affidavit concedes that at the time of the accident there was a sign on Fields-Ertel Road east of the stop sign designating an "Intersection Ahead."[1] No allegation was made that this sign was obscured. Thus, assuming *arguendo* that appellant could not see the stop sign, he still had ample warning that he was approaching an intersection. We accordingly find that appellant was contributorily negligent as a matter of law in failing to yield the right of way at an intersection to a vehicle approaching from the right. R.C. 4511.41; *Lay* v. *Cahill* (1950), 154 Ohio St. 49, 93 N.E.2d 289; *Bevilacqua* v. *Mack* (3rd Dist. 1951), 92 Ohio App. 63, 109 N.E.2d 565.

As the trial court properly granted summary judgment, the

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[1] Phillip Pope, on whose property the stop sign was located, stated by deposition that the sign east of the intersection designated a "Stop Ahead." In determining whether summary judgment is proper, the evidence must be construed in favor of the party opposing the motion. Thus, we will only consider the statement in appellant's father's affidavit.

assignment of error is overruled and the judgment below affirmed.

KEEFE, P. J., BLACK and DOAN, JJ.

PLEASE NOTE:

The court has placed of record its own entry in this case on the date of the release of this Decision.

No. 83-1027

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

KERRY D. MORTON,

Petitioner,

v.

ARCH F. HILDEBRANDT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

---

BRIEF IN OPPOSITION OF RESPONDENTS DEERFIELD TOWNSHIP TRUSTEES

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QUESTIONS PRESENTED

A. Will The Supreme Court of The United States exercise jurisdiction to consider a case in which the sole federal question presented by petitioner was not raised, preserved, or passed upon by the state courts below?

B. Does the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment to The United States Constitution require a state supreme court to retroactively apply that state's comparative negligence statute to a case before it in which the retroactivity of the statute was not urged by petitioner in either that court or the inferior state courts.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-1027

KERRY D. MORTON,

Petitioner,

v.

ARCH F. HILDEBRANDT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

---

BRIEF IN OPPOSITION OF RESPONDENTS TRUSTEES OF DEERFIELD TOWNSHIP, OHIO

Respondents Trustees of Deerfield Township, Ohio, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of The Supreme Court of Ohio in this case.

STATEMENT OF THE CASE

Petitioner was involved in an intersection collision between his motorcycle and a pickup truck on July 23, 1979 when he failed to stop for an existing, present stop sign and collided with a vehicle operated by one Robert P. Cornett (not a party to the suit) who was lawfully proceeding through the intersection. He filed an action against respondents alleging that some or all of them were responsible for maintaining the existing stop sign at the intersection, that foliage had been permitted to obscure the stop sign, and that respondents' omissions had created a nuisance for which they should be required to respond in damages. All respondents pleaded the defense of contributory negligence.

Each respondent filed a motion for summary judgment asserting, *inter alia*, that petitioner was contributorily negligent as a matter of law. While denying any negligence, petitioner resisted those assertions, but did not urge the court to apply Ohio's comparative negligence statute to the case. The trial court granted respondents' motions for summary judgment.

The cause was appealed to the intermediate appellate court and to the Supreme Court of Ohio. The appeals were grounded on the same issues and arguments that were presented to the trial court. Petitioner failed to assert the retroactive applicability of the comparative negligence statute on appeal. The intermediate appellate court affirmed, and the Supreme Court of Ohio declined to exercise jurisdiction.

While the cause was pending in the Supreme Court of Ohio, that court issued its opinion in *Wilfong* v. *Batdorf*, 6 Ohio St. 3d 100 (1983), holding that Ohio's comparative negligence statute, O.R.C. 2315.19, was to be

applied retroactively to negligence actions tried after its effective date of June 20, 1980.

REASONS WHY THE WRIT SHOULD BE DENIED

A. Petitioner failed to raise a federal question in the state courts below.

The sole federal question presented in the petition concerns the purported failure of the state supreme court to retroactively apply the state's comparative negligence statute to this case when that court had previously determined that the statute should be so applied in a different case. It is contended that petitioner's rights to Equal Protection and Due Process were thereby violated.

Petitioner did not present this issue to the state supreme court either before it declined jurisdiction or by way of a motion for rehearing. This Court will not exercise jurisdiction over a case in which the sole federal question presented by petitioner was neither raised nor decided in the state court below. *Cardinale* v. *Louisiana,* 394 U. S. 437 (1969). Where the federal question asserted by petitioner was not unmistakably raised in the state court, a writ will not issue, *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648 (1897), and the federal issue will be deemed waived. *Herndon* v. *Georgia,* 295 U. S. 441 (1935).

Petitioner's failure to raise the federal question presented to this Court in the courts below is fatal to petitioner's assertion of jurisdiction pursuant to 28 U. S. C. Section 1257 (3).

B. The decisions of the state courts and the record do not raise the Question Presented in the petition.

The question presented by the petition is predicated upon allegedly disparate treatment of similarly situated litigants by the Supreme Court of Ohio. Petitioner apparently contends that the result reached by the state court in this case differs from the result reached in reference to similarly situated litigants in the case of *Wilfong* v. *Batdorf*, 6 Ohio St. 3d 100 (1983). This is said to violate petitioner's rights to due process of law and equal protection.

An examination of petitioner's position in the state courts, however, clearly demonstrates that petitioner failed to assert the legal principle which served as the basis for the state courts holding in *Wilfong*, supra. In *Wilfong*, the Supreme Court of Ohio held that O.R.C. 2315.19, the comparative negligence statute, would be given retrospective application, and would be applied in cases tried after June 20, 1980, the statute's effective date. 6 Ohio St. 3d, at page 104.

In reversing the intermediate appellate courts, the *Wilfong* court noted that the courts below had rejected the plaintiff's arguments, "refusing to give retroactive application to R.C. 2315.19, the Comparative Negligence Act." 6 Ohio St. 3d, at page 101. It is apparent that the litigants in *Wilfong*, as distinguished from petitioner, vigorously asserted the issue of retrospective application of the statute in the state courts.

Neither the Due Process Clause nor the Equal Protection Clause require a court to treat a litigant who fails to assert an issue in the same way as one who does raise an issue. The state court's disparate treatment is based upon a rational distinction.

The sole federal issue presented by petitioner presupposes different treatment of similarly situated parties. This presupposition is contrary to the record. The petition presents a hypothetical question, and respondents respectfully request the Court to deny the request for a writ of certiorari.

CONCLUSION

Respondents respectfully submit that the question presented by the petitioner was not raised, argued, or decided in the courts below and further submit that the record does not support the issue raised by petitioner. The writ should be denied.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
FEB 15 1984
ALEXANDER L. STEVAS,

No. 83-1027

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

KERRY D. MORTON,

Petitioner,

v.

ARCH F. HILDEBRANDT, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Ohio

BRIEF IN OPPOSITION OF RESPONDENT WARREN COUNTY COMMISSIONERS

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QUESTIONS PRESENTED

A. Whether the United States Supreme Court has jurisdiction to consider a case in which the only federal question was raised for the first time on petition for certiorari to the Court?

B. Whether the Fourteenth Amendment to the United States Constitution requires a state supreme court to *sua sponte* extend application to the state comparative negligence statute retroactively to include a case pending before the state supreme court?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-1027

KERRY D. MORTON,

Petitioner,

v.

ARCH F. HILDEBRANDT, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Ohio

BRIEF IN OPPOSITION OF RESPONDENT WARREN COUNTY COMMISSIONERS

STATEMENT OF THE CASE

On July 23, 1979, petitioner was involved in a collision at the intersection of Columbia and Fields-Ertel Roads in the vicinity of Cincinnati, Ohio. Petitioner failed to stop at an existing, present stop sign and collided with a vehicle operated by Robert P. Cornett (not a party to the suit). Petitioner filed an action against respondents claiming they had allowed foliage to interfere with the clear view of the stop sign which created a nuisance, making

respondents liable for damages sustained by the petitioner in said accident. Respondents answered raising contributory negligence and sovereign immunity as a defense.

Each respondent filed a motion for summary judgment asserting, *inter alia*, that petitioner was contributorily negligent as a matter of law. Petitioner denied any such negligence, but *did not* urge the court to apply Ohio's comparative negligence statute to the case. The trial court granted respondent's motion for summary judgment.

The case was appealed to the Court of Appeals for the First Appellate District of Ohio and to the Supreme Court of Ohio. The appeals were grounded on the same issues and arguments that were presented to the trial court. In none of these proceedings did petitioner assert the retroactive applicability of the comparative negligence statute. The intermediate appellate court affirmed the trial court's decision, and the Supreme Court of Ohio declined to exercise jurisdiction.

While the case was pending in the Supreme Court of Ohio, that court issued its opinion in *Wilfong* v. *Batdorf*, 6 Ohio St. 3d 100 (1983), which held that Ohio's comparative negligence statute, O.R.C. 2315.19, should be applied retroactively to negligence actions tried after June 20, 1980.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

A. The issue presented by the petitioner was not properly raised in the state courts below.

In his petition for certiorari, petitioner apparently contends his rights to due process and equal protection, as guaranteed by the Fourteenth Amendment, were abridged by the Ohio Supreme Court's failure to apply the Ohio comparative negligence statute to the instant case.

It was very early established that the United States Supreme Court does not have jurisdiction to review a state court decision where federal or constitutional questions are raised for the first time on petition for writ of certiorari to the Court. *Crowell* v. *Randell*, 35 U.S. 368 (1836); *Cardinale* v. *State of Louisiana*, 394 U.S. 437, 438 (1969).

Similarly, an argument initially presented to state courts in terms of state law cannot be converted to a constitutional argument in order to sustain jurisdiction in this Court. *Bailey* v. *Anderson*, 326 U.S. 203, 205-207 (1945).

In the instant case, in both the state court of appeals and the state supreme court, the petitioner urged an interpretation of state law which would allow it to proceed against the respondent upon a theory of negligence. The petitioner did not present the constitutional issue now before the Court to the state supreme court either before it declined jurisdiction or by way of a motion for rehearing. Petitioner's failure to raise the federal questions presented to this Court and the courts below is fatal to its assertion of jurisdiction pursuant to 28 U.S.C. 1357 (3).

B. The Ohio Supreme Court's dismissal of petitioner's appeal did not deprive petitioner of his right to equal protection and due process.

Petitioner apparently argues the state supreme court abridged his right to due process and equal protection when it did not extend the rule of decision announced in *Wilfong* v. *Batdorf*, 6 Ohio St. 3d 100 (1983), to this case, which was pending on petition for writ of certiorari when *Wilfong* was decided. Clearly, however, whether the *Wilfong* case required an extension of the Ohio comparative negligence statute to those cases pending for certification in the Ohio Supreme Court is a question of state law properly raised in the state courts. Moreover, petitioner has failed to indicate how his Fourteenth Amendmennt rights were abridged by the failure of the Ohio Supreme Court to *sua sponte* extend the *Wilfong* decision where the petitioner failed to argue for an application of comparative negligence in any of the state court proceedings. The petition, through a creative wording of the questions presented, seeks to invoke the jurisdiction of this Court in a case which presents no substantial federal questions. The respondents respectfully request, therefore, that the Court deny the request for a writ of certiorari.

CONCLUSION

Respondents respectfully submit that the question presented by the petitioner was not raised, argued, or decided in the courts below. Moreover, the record does not support the issue raised by petitioner for the first time in its petition for a writ of certiorari before this Court. For these reasons the petition should be denied.

Respectfully submitted,

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Warren County Commissioners

No. 83-1027

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

KERRY D. MORTON,

Petitioner,

v.

ARCH F. HILDEBRANDT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

---

BRIEF IN OPPOSITION OF RESPONDENT CRAIG R. PENDLETON, WARREN COUNTY ENGINEER

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QUESTIONS PRESENTED

A. Will The Supreme Court of The United States exercise jurisdiction to consider a case in which the sole federal question presented by petitioner was not raised, preserved, or passed upon by the state courts below?

B. Does the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment to The United States Constitution require a state supreme court to retroactively apply that state's comparative negligence statute to a case before it in which the retroactivity of the statute was not urged by petitioner in either that court or the inferior state courts.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-1027

KERRY D. MORTON,

Petitioner,

v.

ARCH F. HILDEBRANDT, et al.,

Respondents.

On Petition For A Writ Of
Certiorari To The Supreme
Court Of Ohio

BRIEF IN OPPOSITION OF RESPONDENT CRAIG R. PENDLETON, WARREN CO. ENGINEER

Respondent Craig R. Pendleton, Warren County Engineer, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of The Supreme Court of Ohio in this case.

STATEMENT OF THE CASE

Petitioner was involved in an intersection collision between his motorcycle and a pickup truck on July 23, 1979 when he failed to stop for an existing, present stop sign and collided with a vehicle operated by one Robert P. Cornett (not a party to the suit) who was lawfully proceeding through the intersection. He filed an action against respondents alleging that some or all of them were responsible for maintaining the existing stop sign at the intersection, that foliage had been permitted to obscure the stop sign, and that respondents' omissions had created a nuisance for which they should be required to respond in damages. All respondents pleaded the defense of contributory negligence.

Each respondent filed a motion for summary judgment asserting, *inter alia*, that petitioner was contributorily negligent as a matter of law. While denying any negligence, petitioner resisted those assertions, but did not urge the court to apply Ohio's comparative negligence statute to the case. The trial court granted respondents' motions for summary judgment.

The cause was appealed to the intermediate appellate court and to the Supreme Court of Ohio. The appeals were grounded on the same issues and arguments that were presented to the trial court. Petitioner failed to assert the retroactive applicability of the comparative negligence statute on appeal. The intermediate appellate court affirmed, and the Supreme Court of Ohio declined to exercise jurisdiction.

While the cause was pending in the Supreme Court of Ohio, that court issued its opinion in *Wilfong* v. *Batdorf*, 6 Ohio St. 3d 100 (1983), holding that Ohio's comparative negligence statute, O.R.C. 2315.19, was to be

applied retroactively to negligence actions tried after its effective date of June 20, 1980.

REASONS WHY THE WRIT SHOULD BE DENIED

A. Petitioner failed to raise a federal question in the state courts below.

The sole federal question presented in the petition concerns the purported failure of the state supreme court to retroactively apply the state's comparative negligence statute to this case when that court had previously determined that the statute should be so applied in a different case. It is contended that petitioner's rights to Equal Protection and Due Process were thereby violated.

Petitioner did not present this issue to the state supreme court either before it declined jurisdiction or by way of a motion for rehearing. This Court will not exercise jurisdiction over a case in which the sole federal question presented by petitioner was neither raised nor decided in the state court below. *Cardinale* v. *Louisiana*, 394 U. S. 437 (1969). Where the federal question asserted by petitioner was not unmistakably raised in the state court, a writ will not issue, *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648 (1897), and the federal issue will be deemed waived. *Herndon* v. *Georgia*, 295 U. S. 441 (1935).

Petitioner's failure to raise the federal question presented to this Court in the courts below is fatal to petitioner's assertion of jurisdiction pursuant to 28 U. S. C. Section 1257 (3).

B. The decisions of the state courts and the record do not raise the Question Presented in the petition.

The question presented by the petition is predicated upon allegedly disparate treatment of similarly situated litigants by the Supreme Court of Ohio. Petitioner apparently contends that the result reached by the state court in this case differs from the result reached in reference to similarly situated litigants in the case of *Wilfong* v. *Batdorf*, 6 Ohio St. 3d 100 (1983). This is said to violate petitioner's rights to due process of law and equal protection.

An examination of petitioner's position in the state courts, however, clearly demonstrates that petitioner failed to assert the legal principle which served as the basis for the state courts holding in *Wilfong*, supra. In *Wilfong*, the Supreme Court of Ohio held that O.R.C. 2315.19, the comparative negligence statute, would be given retrospective application, and would be applied in cases tried after June 20, 1980, the statute's effective date. 6 Ohio St. 3d, at page 104.

In reversing the intermediate appellate courts, the *Wilfong* court noted that the courts below had rejected the plaintiff's arguments, "refusing to give retroactive application to R.C. 2315.19, the Comparative Negligence Act." 6 Ohio St. 3d, at page 101. It is apparent that the litigants in *Wilfong*, as distinguished from petitioner, vigorously asserted the issue of retrospective application of the statute in the state courts.

Neither the Due Process Clause nor the Equal Protection Clause require a court to treat a litigant who fails to assert an issue in the same way as one who does raise an issue. The state court's disparate treatment is based upon a rational distinction.

The sole federal issue presented by petitioner presupposes different treatment of similarly situated parties. This presupposition is contrary to the record. The petition presents a hypothetical question, and respondent respectfully requests the Court to deny the request for a writ of certiorari.

CONCLUSION

Respondent respectfully submits that the question presented by the petitioner was not raised, argued, or decided in the courts below and further submit that the record does not support the issue raised by petitioner. The writ should be denied.

Respectfully submitted,

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No. 83-1027

IN THE

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KERRY D. MORTON,

Petitioner,

v.

ARCH F. HILDEBRANDT, et al.,

Respondents.

On Petition For A Writ Of
Certiorari To The Supreme
Court Of Ohio

BRIEF IN OPPOSITION OF RESPONDENTS PHILIP K. AND CATHY J. POPE

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QUESTIONS PRESENTED

A. Will the Supreme Court of the United States exercise jurisdiction to consider a case in which the sole Federal question presented by Petitioner was not raised, preserved, or passed upon by the State Courts below?

B. Does the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment to the United States Constitution require a state Supreme Court to retroactively apply that state's comparative negligence statute to a case before it in which the retroactivity of the statute was not urged by Petitioner in either that Court or the state Courts below?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-1027

KERRY D. MORTON,

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ARCH F. HILDEBRANDT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

---

BRIEF IN OPPOSITION OF RESPONDENTS PHILIP K. AND CATHY J. POPE

Respondents, Philip K. and Cathy J. Pope respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Supreme Court of Ohio in this case.

STATEMENT OF THE CASE

On July 23, 1979, Petitioner was involved in an intersection collision between his motorcycle and a pick-up truck when Petitioner failed to stop for an existing Stop sign and collided with a motor vehicle operated by Robert P. Cornett, who has proceeding lawfully through the intersection. Cornett was not made a party to Petitioner's action against the respondents herein in which it was alleged that some or all of them had responsibilities for maintaining the existing Stop sign at the intersection, that foliage had been permitted to grow which obscured the Stop sign, and that respondents' omissions had created a nuisance for which they should be required to respond in damages. The defense of contributory negligence was raised by all respondents in their pleadings.

Thereafter, respondents, Philip and Cathy Pipe, filed a Motion for Summary Judgment asserting that Petitioner was contributorily negligent as a matter of law. The governmental respondents likewise filed Motions for Summary Judgment asserting inter alia that Petitioner was contributorily negligent as a matter of law. Petitioner opposed the Motions for Summary Judgment denying he was negligent, but did not maintain the applicability of Ohio's comparative negligence statute to the case. All Motions for Summary Judgment were granted by the Trial Court.

Petitioner appealed the decision of the Trial Court to the intermediate Appellate Court and to the Supreme Court of Ohio. The appeals were grounded on the same issues and arguments that were presented to the Trial Court. At no time during the appeal proceedings did Petitioner assert the retroactive applicability of the comparative negligence statute. The intermediate appellate Court affirmed the Trial Court ruling and the Supreme

Court of Ohio declined to exercise jurisdiction, dismissing Petitioner's appeal for want of a constitutional question and dismissed the Motion for an order directing the Court of Appeals to certify its record.

During the time the case was pending in the Supreme Court of Ohio, that Court held in *Wilfong* v. *Batdorf*, 6 O.St. 3d 100 (1983) that Ohio's comparative negligence statute, O.R.C. 2315.19, was to be applied retroactively to negligence actions tried after its effective date of June 20, 1980.

REASONS WHY THE WRIT SHOULD BE DENIED

A. Petitioner failed to raise a Federal question in the state Courts below.

The sole Federal question presented in the Petition relates to Petitioner's claim that Petitioner's rights to Equal Protection and Due Process were violated as the result of the purported failure of the state Supreme Court to retroactively apply the state's comparative negligence statute to this case when that Court had previously determined that the statute should be applied in a different case.

At no time during the proceedings before the state Supreme Court did Petitioner present this issue. This Court will not exercise jurisdiction over a case in which the sole Federal question presented by Petitioner was neither raised nor decided in the state Court below. *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969). Where the Federal question asserted by Petitioner was not unmistakably raised in the state court, a writ will not issue, *Oxley Stave Co.* v. *Butler County*, 166 U.S. 648 (1897), and the Federal issue will be deemed waived. *Herndon* v. *Georgia*, 295 U.S. 441 (1935).

Petitioner's failure to raise the Federal question presented to this Court in the state Courts below is fatal to Petitioner's assertion of jurisdiction pursuant to 28 U.S.C., Section 1257 (3).

B. The decisions of the state courts and the record do not raise the Question Presented in the Petition.

The Petitioner contends that the Petitioner's rights to due process of law and equal protection have been violated as a result of allegedly disparate treatment of similarly situated litigants by the Supreme Court of Ohio. Petitioner claims that the result reached by the State Court in this case differs from the result reached in reference to similarly situated litigants in the case of *Wilfong* v. *Batdorf*, 6 O.St. 3d 100 (1983).

The Petitioner's failure to assert in a state court the legal principle which served as the basis for the state Court's holding in *Wilfong, supra*, is fatal to his claim of a violation of Petitioner's rights to Due Process of Law and Equal Protection. In reversing the intermediate appellate Courts, the Supreme Court of Ohio held that O.R.C. 2315.19, the Comparative Negligence Statute, would be given retrospective application and would be applied in all cases tried after June 20, 1980, the statute's effective date. 6 O.St. 3d, at Page 104.

The opinion in *Wilfong* noted that the Courts below have considered and rejected the plaintiff's arguments with respect to the retroactive application of O.R.C., 2315.19, the Comparative Negligence Act. 6 O.St. 3d, at Page 101. It is apparent that the litigants in *Wilfong*, as distinguished from Petitioner, argued and asserted the issue of retrospective application of the statute in the state Courts.

Neither the Due Process Clause nor the Equal Protection

Clause require a Court to treat a litigant who fails to assert an issue in the same way as one who does raise the issue. So long as there is a rational distinction for seemingly disparate treatment by a state Court, there is no denial of Petitioner's right to Equal Protection and the Due Process of Law.

CONCLUSION

Respondents respectfully submit that the question presented by the Petitioner was not raised, argued, or decided in the Courts below and further submit that the record does not support the issue raised by Petitioner. The writ should be denied.

Respectfully submited,

DRODER & MILLER CO., L.P.A.

By _____

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